

The Honorable Robert S. Lasnik

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE

LARRY PIFER and PAMELA PIFER,
Husband and Wife,

Plaintiffs,

vs.

BANK OF AMERICA, N.A., a national
association, SPECIALIZED LOAN
SERVICING LLC, a foreign corporation, NEW
PENN FINANCIAL, LLC, d/b/a SHELL
POINT MORTGAGE SERVICING, a foreign
corporation, and THE BANK OF NEW YORK
AS TRUSTEE FOR THE
CERTIFICATEHOLDERS OF THE CWABS,
INC., ASSET-BACKED CERTIFICATES,
SERIES 2007-8, a national association.

Defendants.

CASE: 18-cv-00606-RSL

RESPONSE & OBJECTION TO BANK
OF AMERICA'S MOTION TO
DISMISS

NOTE ON MOTION CALENDAR:
June 15, 2018
Without Oral Argument

COME NOW, LARRY PIFER and PAMELA PIFER, husband and wife, by and through
the undersigned counsel, file this Response and Objection to the Motion to Dismiss brought by
defendant BANK OF AMERICA, N.A. ("BANA").

FACTS

BANA admits that it provided the Pifers with a Loan Modification Agreement to sign

1 which states positively that BANA is the “Lender.” The Loan Modification Agreement specifies
 2 that the principal amount is \$434,710.30, and the “new interest rates” would increase in steps or
 3 2% in years 1-2; 3% in year 4; 4% in year 5 and 4.875% in year 6.(Dkt. 3, FAC, Ex. D, BANA
 4 Loan Modification Agreement). Despite the Pifers’ full performance of the terms of the Loan
 5 Modification Agreement, including making payments in the amount specified for many months,
 6 BANA, as Lender, refused to return the fully executed Loan Modification Agreement. Instead,
 7 **BANA issued its Notice of Intent to Accelerate dated November 2, 2011** (Dkt. 3, FAC, Ex.
 8 E, Notice of Intent to Accelerate). Having received the Notice of Intent to Accelerate, the Pifers
 9 believed they had no incentives at all to consider any other offer made by BANA.

10 In January of 2013, BANA sent the Pifers correspondence informing that they have been
 11 determined ineligible for a loan modification because the Loan “was previously modified.”
 12 BANA indicated further that “The Program does not allow more than one modification in 12
 13 months or 2 modifications in a 5-year period.” (Dkt. 3, FAC, Ex. G, BANA Letter dated
 14 1/15/13). Two months later, in March of 2013, BANA sent the Pifers correspondence which
 15 states “Congratulations. We have determined that you are eligible for a trial modification.”
 16 BANA baited the Pifers to make three payments starting April 1, 2013 in the amount of
 17 \$1968.63, by promising, “we will contact you to discuss the terms of your permanent
 18 modification.” This amount of the trial payments did not relate to the Loan Modification
 19 Agreement, and BANA did not acknowledge the payments that the Pifers made toward the
 20 Loan Modification Agreement in 2011 whatsoever (Dkt. 3, FAC Ex. H, BANA Letter dated
 21 3/4/13).

22 Within the span of a few weeks, and in contradiction to the first letter offering a trial
 23 modification, BANA also sent the Pifers another letter dated March 26, 2013, that reads, “Bank
 24

1 of America previously evaluated your loan for a modification and informed you by a letter
 2 dated 9/25/2012 that you were not eligible (Dkt. 3, FAC Ex. I, BANA letter dated 3/26/2013).

3 Having made payments under the previous loan modification agreement, but not the
 4 benefit of acknowledgement by BANA of the receipt of same, or the benefit of a fully executed
 5 contract, the Pifers were not able to know what their obligations were and what payment to
 6 make on monthly basis going forward. The Pifers continued to make inquiry to BANA as to the
 7 situation of the Loan on a continuing basis without the benefit of any truthful information. From
 8 the date of their signing of the 2011 Loan Modification Agreement and up until 2018, BANA
 9 has never produced a copy of the fully executed agreement or explained the status of said
 10 agreement. BANA transferred the Pifer Loan to more than one servicer during the course of the
 11 next several years. In late 2016, the Loan was transferred once again to a new servicer,
 12 defendant Shell Point. Shell Point issued to the Pifers a **Validating of Debt Notice dated**
 13 **December 8, 2016, identifying “The name of the creditor to whom the debt is owed is Bank**
 14 **of America, N.A.”** (Dkt. 3, FAC, Exhibit O, Validation of Debt Notice).

15 LEGAL AUTHORITY & ANALYSIS

16 In ruling on BANA’s motion to dismiss under Rule 12(b)(6), this Court analyzes the
 17 complaint and takes all allegations of material fact as true and construe[s] them in the light most
 18 favorable to the Pifers as the non-moving party." *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480,
 19 1484 (9th Cir. 1995). Dismissal is appropriate only when the complaint does not give the
 20 defendant fair notice of a legally cognizable claim and the grounds on which it rests. *Bell Atl.*
 21 *Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). In considering
 22 whether the complaint is sufficient to state a claim, the court will take all material allegations as
 23 true and construe them in the light most favorable to the plaintiff. *NL Indus., Inc. v. Kaplan*, 792

1 F.2d 896, 898 (9th Cir. 1986); *Barker v. Riverside County Office of Educ.*, 584 F.3d 821, 824
 2 (9th Cir. 2009).

3 **THE PIFERS' CLAIM OF QUIET TITLE AGAINST BANA IS PLAUSIBLY PLEADED**

4 Under Washington law, an action to quiet title is equitable by nature and granted in
 5 resolution of competing claims of ownership. RCW 7.28.010. The Pifers as the owner of
 6 record of the property is allowed to compel all those who assert a hostile right or claim to come
 7 forward and assert their right or claim and submit it to judicial determination. In their First
 8 Amended Complaint, the Pifers assert that BANA asserted itself as the “lender” in the Loan
 9 Modification Agreement given to them to sign and that BANA in fact issued a Notice of Intent
 10 to Accelerate against them. (Dkt. 3, FAC, para. 11-12. Ex. D & E). Plaintiffs have pleaded that
 11 the servicing of the Loan was transferred to SLS and then to Shell Point who in 2018 informed
 12 them that “[t]he current owner of this Loan is BONY as trustee for CWABS 2007-8 GR FIXC .
 13 . .” (Dkt. 3, FAC, para. 24, Ex. P). Where there is no way for the Pifers to determine whether
 14 the “lender” is the same as the “owner,” and where loan services are allowed to do whatever
 15 they want with borrowers in the context of loss mitigation, a quiet title claim is as good as
 16 against BANA as any other entity who has asserted, is asserting, or will assert the right to
 17 disturb the Pifers’ possession as the record owner of the property before said judgment is
 18 granted.

19 The Pifers allege that in December of 2016, they received a Validating of Debt Notice
 20 dated December 8, 2016, identifying “The name of the creditor to whom the debt is owed is
 21 Bank of America, N.A.” (Dkt. 3, FAC Exhibit O, Validation of Debt Notice). This fact, taken as
 22 true, gives rise to their quiet title claim against BANA and dismissal would be inappropriate.

23 **THE PIFERS' CLAIMS FOR BREACH OF CONTRACT AND BREACH OF GOOD**
 24 **FAITH AND FAIR DEALING AGAINST BANA ARE PLAUSIBLY PLEADED**

Where statutes of limitations are to promote fairness, fairness may require that the statutory bar not to be enforced strictly under certain circumstances. *Mont. Pole & Treating Plant v. I.F. Laucks and Co.*, 993 F.2d 676, 678 (9th Cir. 1993). In particular, the statutory bar should not operate when the plaintiff has no knowledge of the facts essential to the cause of action. *Id.* at 678. "Under federal law [accrual begins] when the plaintiff knows or has reason to know of the injury that is the basis of the action." *N. Cal. Retail Clerks Unions & Food Emp'rs Joint Pension Tr. Fund v. Jumbo Markets, Inc.*, 906 F.2d 1371, 1372 (9th Cir. 1990); *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1266 (9th Cir. 1998) (Under the general federal rule, the limitations period begins to run when the plaintiff knows or has reason to know of the injury which is the basis of the action).

Without waiving their claim of Quiet Title based on the expiration of the Statute of Limitations, in 2018, through the periodic statements issued by SLS and Shell Point, the Pifers finally discovered for the first time that the defendants were enforcing the terms of the Loan Modification Agreement that they signed, and under which they initially performed. In all the correspondences BANA issued to the Pifers, it never communicated to the Pifers that the Loan Modification Agreement was valid and enforceable. The opposite occurred; BANA told the Pifers in January of 2013 that they have been determined ineligible for a loan modification and in March of 2013, BANA sent the Pifers a letter which states "Congratulations. We have determined that you are eligible for a trial modification." BANA's communication, for months and years after its failure to return the fully executed Loan Modification Agreement to the Pifers worked only to solidify the Pifers' belief that there was no valid and enforceable loan modification. BANA's offer of three trial payments starting April 1, 2013 in the amount of \$1968.63, and its promise, "we will contact you to discuss the terms of your permanent

modification,” proved that BANA did not honor the Loan Modification Agreement that the Pifers signed and returned in 2011 (Dkt. 3, FAC, Ex.H, BANA Letter dated 3/4/13). Shortly after this offer of trial payments, BANA also sent the Pifers another letter dated March 26, 2013, that reads, “Bank of America previously evaluated your loan for a modification and informed you by a letter dated 9/25/2012 that you were not eligible (Dkt. 3, FAC Ex. I, BANA letter dated 3/26/2013). Not once did BANA mention to the Pifers of its decision to honor the 2011 Loan Modification Agreement. As a financial institution, BANA has a policy of demanding borrowers to sign loan modification agreements but not returning fully executed contracts to them? The Pifers’ allegations, supported by BANA’s own written words, contradict BANA’s position that it in fact honored the terms of the 2011 Loan Modification Agreement.

BANA breached the Loan Modification Agreement because it transferred the Loan to SLS on the pretense that the Loan was in default while BANA was in fact the defaulting party and not the Pifers. BANA’s breach made it impossible for the Pifers to perform their end of the bargain. BANA had an affirmative duty to timely inform the Pifers that the Loan Modification Agreement did not require BANA’s signature. In the alternative, if it is in fact BANA’s policy not to provide borrowers with a fully executed loan modification agreement, BANA had a duty to inform the Pifers of its policy in a timely manner. Defense counsel’s argument contained within the instant Motion to Dismiss—that BANA honored the Loan Modification Agreement all along—is the first that the Pifers have heard about the status of their submission of the Agreement they signed and sent back.

What BANA has done to the Pifers is a continuing breach or wrong. As such, their cause of action for breach of contract and breach of good faith and fair dealing are based on a “theory

of continuous accrual.” Continuous accrual applies whenever there is a continuing or recurring obligation. “A contract that creates continuing obligations ‘is capable of a series of partial breaches or a single total breach by repudiation.’” *Minidoka Irrigation Dist. v. Dep’t of Interior of U.S.*, 406 F.3d 567, 572-73 (9th Cir. 2005); *Peterson v. Highland Music, Inc.*, 140 F.3d 1313 (9th Cir. 1998) (Plaintiff musicians asserted claims for royalties under a recording contract that had been formed thirty years earlier for which the defendants continued to fail to make payments); *Wolf v. Travolta*, 167 F.Supp. 3d 1077 (C.D. Cal. 2016) (continuous accrual applies “When an obligation or liability arises on a recurring basis, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period.”) Continuous accrual applies in this case because the Pifers would have been obligated to make payments under the Loan Modification Agreement for 26 years. BANA’s breach continues to accrue because for each missed payment that the Pifers did not know they should have made, the elements of the claim are present—wrongdoing, harm, and causation.

THE PIFERS’ CLAIM OF NEGLIGENT MISREPRESENTATION AGAINST BANA IS VIABLE

The Pifers’ claim of negligent misrepresentation against BANA is not time-barred. As discussed, BANA’s conduct and written communication have directly contradicted its position that the Loan Modification Agreement was valid and enforceable and continues to operate up until the present. The Pifers could not have known this position taken by BANA but for the filing of this lawsuit. The federal discovery rule provides that in the appropriate circumstances, a cause of action may accrue, and the statute of limitations period may begin to run, not when the injury that serves as the basis for the action occurs, but when a plaintiff knows or has reason to know of the injury. *Clement v. United Homes, LLC*, 914 F.Supp.2d 362 (E.D. NY. 2012) (Claims under the Fair Housing Act, as well as under 42 U.S.C.S. §§ 1981, 1982 and 1985, are

1 subject to the discovery rule and thus accrue when a plaintiff knows or has reason to know of
 2 the injury that serves as the basis for the action). The Ninth Circuit applies the discovery rule in
 3 determination of state's statute of limitations. *Bibeau v. Pac. N.W. Research Found. Inc.*, 188
 4 F.3d 1105, 1108 (9th Cir. 1999) ("It is inequitable to bar someone who has no idea he has been
 5 harmed from seeking redress, the statute of limitations has generally been tolled by the
 6 'discovery rule.' "), amended by 208 F.3d 831 (9th Cir. 2000).

7 Plaintiffs assert that BANA as the lender and loan servicer, it (1) supplied information
 8 for the guidance of others, including the Pifers, SLS and Shell Point, regarding the Loan, which
 9 was false, (2) knew or should have known that the information was supplied to guide the Pifers
 10 in their mortgage loan and knew that the information supplied was false or otherwise
 11 misleading, (3) was negligent in obtaining or communicating the false information, (4) the
 12 Pifers relied on the false information, (5) the Pifers' reliance was reasonable, and (6) the false
 13 information proximately caused the Pifers damages.

14 Here, BANA asserts that the Pifers' claim should be dismissed because "they do not
 15 allege that BANA made any actual misrepresentation regarding the status of the Loan or Loan
 16 Modification." This assertion overlooks the numerous correspondences issued by BANA
 17 between 2011 and 2013 that caused the Pifers as borrowers to have whiplash. Did they have a
 18 loan modification, yes they did. Oh no, they didn't. Well, we offered them a trial modification,
 19 but before they could accept, let's tell them they are not eligible for a loan modification.
 20 BANA's claim that it did not affirmatively mislead the Pifers is simply incredulous and must be
 21 rejected.

22 **THE PIFERS' CLAIM AGAISNT BANA FOR VIOLATION OF THE CONSUMER**
 23 **PROTECTION ACT IS VIABLE AND MUST NOT BE DISMISSED**

1 The Pifers allege that BANA violated the Washington Consumer Protection Act
 2 (“CPA”) as to each of the five elements: they have committed one or more (1) unfair or
 3 deceptive act or practice; (2) in trade or commerce; (3) that has an impact on the public interest;
 4 (4) resulted in injury in the Pifers in their business or property; and (5) the injury and damages
 5 suffered were proximately caused by the defendants. They allege that the business of default
 6 loan servicing with includes nonjudicial foreclosure has been adjudicated by Washington courts
 7 to be occurring in commerce and impacting an important public interest. BANA does not deny
 8 that it uses the mail, the telephone and the internet to transmit notice of intent to accelerate,
 9 periodic statements, notice of default, debt validation, notice of trustee’s sale, and other
 10 correspondence to borrowers including the Pifers; they receive substantial compensation for
 11 their services and part of their compensation comes directly from payments made by borrowers.
 12 Thus, the defendants’ business activities are carried out in trade or commerce.

13 The Pifers specifically allege that where BANA issued the Notice of Intent to Accelerate
 14 dated November 2, 2011, the lender, whoever it is, had only six years from the date of the Notice
 15 of Intent to Accelerate to foreclose on the Property as collateral of the mortgage loan. Where the
 16 six-year period of statute of limitations expired on November 2, 2017, the Notice of Trustee’s
 17 Sale recorded on January 17, 2018, setting the auction sale date of May 18, 2018, was issued
 18 after the statute of limitations had expired and is not effective to foreclose on the Pifer residence.

19 The defendants’ action of foreclosing on the Pifer residence based on the terms of the
 20 Deed of Trust after the statute of limitations expired is unfair. The defendants’ act of
 21 transmitting various foreclosure documents and correspondence to the Pifers for debt collection
 22 purposes (compelling payment to cure) and for foreclosure purposes is deceptive because the
 23 lender’s legal right to foreclose on the collateral has been limited or eliminated by the statute of
 24

1 limitations.

2 The Pifers allege that there are inconsistency between BANA's assertion of ownership
3 of the Loan, and the competing claim asserted by the Bank of New York Mellon as the
4 purported beneficiary under the Deed of Trust. There exists a great doubt about who is the
5 proper beneficiary to appoint the defendants to be trustee for purposes of the nonjudicial
6 foreclosure. BANA is directly responsible for the inconsistency regarding ownership of the
7 Loan and beneficiary status before commencing nonjudicial foreclosure and said inconsistency
8 materially violated the Deed of Trust Act, which serves as the basis for the Pifers' claims under
9 the CPA. BANA is directly responsible for transferring inaccurate information concerning the
10 status of the Pifer loan, including whether a loan modification was consummated, to the
11 subsequent servicers who in turn issued inaccurate periodic statements over the course of 2015,
12 2016, 2017 and 2018. The Pifers have suffered an enormous loss of time and resources in their
13 efforts to contact the loan servicers, the purported loan owner, and other governmental agencies
14 to get answers to their questions regarding the Loan and the Foreclosure. The time spent and
15 resources expended by the Pifers are time that they could work and earn an income, or enjoy
16 their life. These establish the injury element of a private action by the Pifers against the
17 defendants under the Consumer Protection Act.

18 CONCLUSION

19 Essentially, BANA argues that the Court should reject the Pifers' claims in their entirety
20 as time-barred. Yet, in fairness, BANA's conduct of deception and unfairness is what caused
21 the enormous confusion and frustration for the Pifers as borrowers who are trapped in the
22 default-foreclosure purgatory. There exists equitable and compelling reasons why BANA's
23 Motion to Dismiss should be denied and the Pifers respectfully request the Court to deny it.

1 DATED this 11th day of June, 2018.

2 BARRAZA LAW, PLLC

3 /s/ V. Omar Barraza

4 _____
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7 CERTIFICATE OF SERVICE

8 I hereby certify that on the 11th day of June, 2018, I caused to be electronically filed and
9 served the foregoing Response and Objection to Defendant BANA's Motion to Dismiss with the
Clerk of Court via CM/ECF system upon the following:

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